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Supreme Court, U. S.
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No. 99 135

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

JACKSON SECURITIES & INVESTMENT COMPANY,
a Corporation,
Petitioner,

versus

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

and

BRIEF AND ARGUMENT

Of Crampton Harris, Birmingham, Alabama,
in Support of Petition.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner (appellee in the Court below), Jackson Securities and Investment Company, a corporation (hereinafter referred to as Jackson), prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals entered on the twentieth day of February, 1947 and the opinion of the same date in support

thereof, on which a petition for rehearing was denied by said Court in an order dated March 19, 1947 without opinion.

A transcript of the record in the case, including the proceedings in said Court, is furnished herewith in accordance with the rules of this Court, which transcript is supplemented by original exhibits certified by the Clerk of the District Court to said United States Circuit Court of Appeals for the Fifth Circuit by order of the District Court and now certified to this Court.

JURISDICTION.

The jurisdiction of this Court is based on section 240 (a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the act of February 13, 1925.

SHORT STATEMENT OF THE MATTER INVOLVED.

This case involves the right of a real estate broker with an exclusive agency to be paid for his services in obtaining a satisfactory tenant. The owner would not complete negotiations with such tenant and negotiated a lease on its own account with a third party. This arbitrary disregard of the broker's rights set up a chain reaction which ran through various devices and manipulations by the owner and came to an end with the broker's tenant still in possession under a new lease from a so-called redemptioner controlled and directed by the owner both as to the making of such new lease and the terms thereof, the rents reducing Prudential's investment.

On appeal to the Circuit Court of Appeals, that Court reversed the judgment of the District Court in favor of the broker.

A copy of the opinion of the Circuit Court of Appeals is set forth in the appendix.

QUESTIONS PRESENTED.

The questions presented are:

1. Is the owner of real estate who enters into an exclusive leasing contract with a real estate broker under an obligation to act in good faith toward the broker?

2. Can a real estate owner avoid his obligation to pay for services rendered by an exclusive leasing broker by any intricate device or scheme whatsoever, which winds up with the broker's tenant in the premises under a new lease?

3. When a real estate broker and the owner of real estate enter into contracts having provisions with reference to "rights of redemption" and "sales," are the parties contracting about bona fide "redemption" and bona fide "sales"? Can the broker's rights to pay for his services be defeated by a fictitious or specious "redemption" or "sale" made in bad faith?

4. Does a broker with an exclusive leasing agency earn a commission when he obtains a satisfactory tenant?

5. Is it in accord with due process for a Circuit Court of Appeals to decide a question of local law directly contrary to the decisions of the highest court of the state?

6. Where the opinion of the Circuit Court of Appeals shows that the court has not applied the applicable local law and has also failed to grasp the nature of the different counts of the complaint and thereby worked an injustice, does that constitute a departure from the accepted and usual course of judicial proceedings so as to call for an exercise by the Supreme Court of its power of supervision?

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully submits that there exist special and important reasons for the granting of the writ of certiorari herein prayed for because:

1. The decision of the Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

2. The decision of the Circuit Court of Appeals constitutes a departure from the accepted and usual course of judicial proceedings in that the decision reveals a failure to grasp the questions presented by the pleadings and the evidence and shows such a state of confusion on the part of the court as to call for an exercise of the Supreme Court's power of supervision.

3. Parties to a contract mutually pledge one another cooperation and good faith. This pledge is implied as a matter of law. No Federal Court should remove this pledge and thereby lower the ethical standards which govern the transaction of business.

4. The Supreme Court in the exercise of its supervisory power over all Federal Courts, should see to it that no decision lowers the high ethical standards which the common law of the states has placed upon those doing business therein.

5. The decision of the Circuit Court of Appeals works an injustice in that it enables Prudential to use Jackson's services without paying Jackson any compensation therefor.

6. The decision of the Circuit Court of Appeals was in error because it used the owner's right to sell under a sales contract to avoid his obligation to pay for services already rendered under a separate leasing or management contract.

7. The decision of the Circuit Court of Appeals is wrong in that it treats two separate contracts, one entered into on November 28, 1939, and the other on April 22, 1937, as if they were one.

8. The decision of the Court of Appeals shows confusion as to the meaning of Counts 6, 7 and 8. They do not contain the allegations ascribed to them in the opinion.

STATEMENT.

Jackson's relation with Prudential began in 1909 (R. 189). The lease management agreement between them was executed in April, 1937 (R. 192, PX. 3). The management agreement contained these clauses:

> "2. The Prudential, by its president or vice president, hereby appoints and employs the manager as the exclusive managering agent for the Prudential of said properties described in schedule 'A' * * *
>
> "12. The manager shall use his best efforts to secure tenants for the properties listed in schedule 'A', through his own organization. * * * The manager further agrees to maintain an organization at all times sufficient to enable him to carry out the provisions of this paragraph * * *
>
> "21. * * * All leases in excess of one year the right to negotiate as to the amount of commission to be paid is reserved. * * *"

On January 10, 1941, Prudential acquired the premises involved by foreclosure of its mortgage (R. 466). The mortgage debt at foreclosure was about $325,000.00 (R. 533). Prudential's title was subject to a two year statutory right of redemption (Appendix, Title 7, Section 727, Code of Alabama, 1940). Upon foreclosure the property was listed with Jackson under schedule "A" of the management contract (R. 254).

The First Lease.

Prudential put the property in Jackson's hands in 1941 under the terms of the management contract. Jackson, working with another broker named Metcalf, produced a tenant, namely, the Darling Store (R. 260), and the leasing fee was paid by Prudential to Jackson and divided with Metcalf without objection (R. 261).

The first Darling Store lease expired December 31, 1943 and contained the following clause:

> "Nineteenth: The Landlord agrees to give Tenant the first opportunity to negotiate for the renewal of this lease, or in the event building is subdivided into two or more stores, for whatever space is desired; on a basis satisfactory to the Landlord, provided said negotiations are completed at least ninety (90) days prior to the expiration of this lease."

Negotiations for Renewal.

In September, 1943, Metcalf went with Cahill of Jackson's organization to New York to confer with Darling and obtain a proposition (R. 282, 283). Darling proposed a long term lease providing for a minimum annual rental of from eighteen to twenty thousand dollars with six percent of sales (R. 283). They returned to Birmingham and communicated Darling's proposition to Abernathy, Prudential's Birmingham Manager, who stated that he thought they could get a better deal out of Darling. Cahill asked Abernathy for a counter proposition that he would recommend and was then informed by Abernathy they were negotiating with another prospect. He would not give Cahill a counter proposition (R. 283).

Prudential's Private Deal With Ann Lewis.

In July or August, 1942 (R. 138), John Carr of Jemison Realty Company, a competitor of Jackson, went to Pru-

dential's office in Birmingham and asked Abernathy for permission to work on the property (R. 145). Abernathy consented and agreed with Carr on a cash commission of 2½ percent of a rental reserve if he produced a lease (R. 140, 141). Abernathy even went to New York with Carr in the first week of October, 1942, and while there they conferred with McGregor, an official of Prudential at Newark (R. 149). The negotiations finally resulted in the draft of a lease by Prudential's attorney which was signed by Ann Lewis Stores and mailed direct to the Home Office of Prudential (R. 150). This lease was submitted to the Finance Committee of Prudential on December 11th and was approved (PX. 12, R. 340). The lease to Ann Lewis contained the following proviso:

> "15. This lease is subject to the statutory right of redemption which expires January 10, 1943 * * *" (PX. 12, R. 340).

Prudential never submitted to Cahill any counter proposition. On the contrary, Abernathy told Cahill he was wasting his time going to New York (R. 286).

Jackson's Tenant, Darling Stores, Sues Prudential in New York and Alabama.

On November 17, 1944, Bilder, Darling's Newark Attorney, wrote Prudential calling their attention to clause 19 and accused Mr. Abernathy of avoiding them when they went to Birmingham to confer with him (PX. 15, R. 343). On November 30th Darling wired to Prudential:

> "We would like to offer for your consideration Twenty Six Thousand Dollar per year minimum rental for five or ten year lease against six percent of sales for Birmingham property have wired this offer to Abernathy" (PX. 17, R. 348).

This telegram evoked a memorandum for Mr. Robert L. McGregor, Supervisor of Prudential's Mortgage Loan Department, which contained the following:

> "* * * I believe this whole matter is fraught with danger because if Darling Stores could ever prove that they made an offer which was better than the Ann Lewis' offer, and we refused to accept the offer, undoubtedly under the terms of their lease, they could sue us for considerable damages. * * * It is my considered opinion, therefore, that within a very few days we must, in fairness to Darling Stores, give them our decision and I think the right decision is that—we will renew their lease" (PX. 17, R. 348).

On December 2nd Darling instituted suit against Prudential in the Circuit Court of Jefferson County, Alabama, Equity side, praying an injunction to prevent the leasing of the property to Ann Lewis (PX. 20, R. 354). On December 5th Darling instituted a similar suit in the Supreme Court of New York and a writ of injunction issued out of that Court and served upon Prudential on December 8th (PX. 24, R. 356). Notwithstanding these suits the Ann Lewis lease was presented to the Financial Committee on December 11th and was approved (PX. 27, R. 361).

Prudential Brings Darling and Nelson Together.

Nelson, representing the mortgagor in the foreclosure proceedings, came upon the scene in the middle of December (R. 507). He went to the Home Office of Prudential to effect redemption if he could. Captain Nelson testified that if Prudential had insisted upon its strict legal rights and demanded the $408,000.00 or $409,000.00 they could not have redeemed the property (R. 488).

Carrick, an attorney for Prudential, suggested to Nelson that he get in touch with Mr. Bilder, attorney for the Dar-

ling Stores, "with the idea that Darling Stores and the Nelson Estate might work together" (PX. 33, R. 365). About this time Carrick also wrote Abernathy:

> "* * * they are not at this point acting through the Nelson Estate, although in my telephone conversation with Mr. Bilder I have told him that we want the property redeemed" (PX. 37, R. 368).

There Was No Legal Redemption.

The full amount required to redeem as of January 1, 1943 was $408,949.63 (R. 364, PX. 30). Nelson, even with Darling's financial support, couldn't pay the full amount (R. 488). Prudential, therefore, desired to make concessions. On December 16th Carrick wired Robertson, Prudential's Birmingham lawyer:

> "Darling people considering redemption through deal with Nelson Estate. If, in order to protect ourselves against Ann Lewis, we insist on strict legal redemption, would your law permit any concession in favor of redemptioner in the matter of penalty interest?" (R. 364, PX 31.)

Robertson replied on the same day:

> "In my judgment 'strict legal redemption' means just what it says, and the redemption statutes call for and require a penalty interest at the rate of 10% per annum, and a 'strict legal redemption' could be on no other basis" (R. 364, PX. 32).

On December 16th Carrick wrote Abernathy:

> "* * * There still remains the over-all question mentioned in my previous letter, as to whether the Prudential will be entirely safe from Ann Lewis upon its selling the property under any such deal as the foregoing. It is more likely than not that the Nelson Estate cannot raise even the minimum $40,000 indicated above, but this same question is going to arise

> again when Darling Stores makes us some sort of an offer for less than the full amount due us on a strict legal redemption basis * * *" (R. 365, PX. 33).

Abernathy replied that he agreed with Robertson and that Prudential might be "subject to exposure" (R. 366, PX. 36).

In order to bring about a situation whereby Prudential could deliver a lease of the property through Nelson to Darling the amount required to redeem was reduced from $408,949.63 to $360,000.00. On December 24th Carrick wrote to Abernathy:

> "Mr. Rogers decided that we should hold the property available for redemption at the figure of $360,000. This 'redemption' must be by the Nelson Estate and that will force the Darling people to do business with Captain Nelson. * * *
>
> "At the same time that I am mailing this letter to Captain Nelson, I am telephoning the $360,000 figure to Mr. Bilder" (R. 378, PX. 39).

The cold calculation with which Prudential manipulated circumstances and forced the reluctant Nelson to do business with Darling is revealed in Carrick's letter of December 31 to Abernathy:

> "As I size the matter up, Captain Nelson will be squeezed by the Darling people if the cash needed is in excess of the $25,000 he can himself raise. It appears to me that he is making a desperate effort to avoid putting himself in their power. * * * I believe that our being firm will force him to come to terms with them quickly and then we will have something offered us before January 10th. If we should show weakness, in my opinion it would delay the showdown between Captain Nelson and the Darling people" (R. 378, PX. 40).

In the end the extremes to which Prudential went is graphically portrayed in the letter of Carrick to Robertson which is shown beginning at page 379 of the record and is Plaintiff's Exhibit 42. That letter reveals that Prudential finally agreed to accept and did accept $340,793.00. This acceptance was extraordinary in that it reserved $3,500.00 to pay attorneys' fees for defending the Darling suits; $1,500.00 to "salve" the broker on the Ann Lewis lease. This letter also takes up the dating of documents which did not correspond with the reality. It shows that Prudential was to give the Nelson Estate a quitclaim deed and to take back from it a note and mortgage for $310,000.00. This remarkable letter contains this language just before the end thereof:

> "The deal between Darling and Nelson is rather complicated, but it is necessary that we should go into it, because Darling, which is putting up the money on Nelson's behalf, is looking to us for some protection. The new lease is to be subordinate to our mortgage. The landlord's interest is to be assigned to the Prudential, and we are going to be expected to actually receive the rent—which protects Darling from Nelson's possibly diverting the money to some other purpose than the carrying of this property."

An Illustration of Hypocrisy.

The manner in which Prudential covered itself up with words while manipulating its devices in ruthless fashion is illustrated in the resolution of the Financial Committee relative to the interest rate in Alabama on redemption. That resolution reads:

> "We avoid taking the unconscionable interest rate permitted by the Alabama Statute" (R. 382, PX. 47).

This noble pronouncement provoked the following reply from Prudential's Birmingham Title Attorney:

> "The Finance Committee approval makes reference to '* * * the unconscionable interest rate permitted by the Alabama Statute.' This 10% penalty law has been on the Statutes of the State of Alabama since Clay's Digest of 1843 and was incorporated as Section 2118 of the first Code of Alabama in 1852 and became a law by act of Legislature on January 1, 1842. It has not since been changed. Are we to consider this as a precedent and discontinue the charging of the statutory penalty in future redemptions? We have never before waived it" (R. 384, PX. 50).

The pretense of redemption within the statutory period appears more clearly when it is noted that this strange "redemption" was on the receipt of a "tender" merely accompanied by a check from Darling for $30,000.00. The Financial Committee of Prudential did not approve it until January 14th (PX. 47, R. 382). The instruments of conveyance are dated January 9, 1943, but as to Exhibit 52 (R. 386) the acknowledgment is dated January 26, 1943, and the mortgage back to Prudential which is dated January 9 bears acknowledgment dated March 5, 1943 (R. 389, PX. 56).

Nelson Must Submit New Lease to Darling to Prudential for Approval.

The attorneys for Darling drafted the lease and submitted it to Carrick, the attorney for Prudential. On January 18 Carrick wrote: "I will go over the draft of the lease prepared by Mr. Dorman at my first opportunity" (R. 381).

Verdict for Jackson in the Sum of $3,625.00.

The Court of Appeals reversed the judgment for Jackson in the sum of $3,625.00. This judgment was based on Jackson's rights under his management agreement. The

evidence showed that the cash value of the broker's services on executing a lease is not less than 2½ percent of the rent reserved (R. 143). The rent reserved in the first term certain of the Darling lease aggregates $153,600.00 (R. 292), so that a proper verdict and judgment should have been not less than $3,840.00.

It is respectfully submitted that, for the reasons stated, the petition for writ of certiorari should be granted.

.....

CRAMPTON HARRIS,
Birmingham, Alabama.

State of Alabama, }
Jefferson County. } ss.

Crampton Harris, being first duly sworn, deposes and says that he is attorney for petitioner above named; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

.....

Subscribed and sworn to before me this.....day of June, 1947.

.....

Notary Public.

State of Alabama,
Jefferson County. } ss.

I, Crampton Harris, attorney at law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for writ of certiorari; that the same is not made for purposes of delay and that in my opinion, said petition is meritorious and well founded in law and ought to be granted and the writ issued.

I further certify that I have personally given notice of the filing of the petition, together with a copy of the petition, supporting brief and printed record by serving copies thereof on Mr. Francis H. Hare, counsel for respondent.

.....

Crampton Harris.

BRIEF AND ARGUMENT
Of Crampton Harris of Birmingham, Alabama, in Support of Foregoing Petition.

I.

The decision of the Circuit Court of Appeals neither holds the owner to the good faith required of him by the law of Alabama, nor does it recognize the right of a real estate broker to commissions upon obtaining a satisfactory tenant as construed by the Supreme Court of Alabama.

A.

The fundamental rule of the common law is stated in the first edition of Williston's Treatise on Contracts, Section 1318, as follows:

> "In any case where the plaintiff's performance requires the cooperation of the defendant, as in a contract to serve or to make something from the defendant's materials or on his land, the defendant, by necessary implication, promises to give this cooperation and if he fails to do so he is immediately liable though his only express promise is to pay money at a future day. So in a contract of life insurance a promise on the part of the company to accept the premiums is clearly implied in fact and a refusal to receive premiums is an immediate breach of contract. Indeed, it seems that there is generally in a conditional contract an implied promise not to prevent performance of the condition."

The Supreme Court of Alabama, in the case of World's Exposition Shows v. B. P. O. Elks, 237 Ala. 329 (186 Sou. 521), say:

> "The chief difficulty with defendant lies in the fact that the argument against plaintiff's recovery of this guaranteed amount must rest upon the failure of defendant to perform its contract. Or, to state it other-

wise, plaintiff must be denied the recovery of the guaranteed one thousand dollars because of defendant's breach of the contract. Such a conclusion runs counter to a well settled principle of law, as stated in 3 Williston on Contracts, section 677, and very generally recognized by the authorities, as follows: 'It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.' "

The Supreme Court of Alabama in the case of Ackley & Co. v. Hunter, Benn & Co.'s Co., 166 Ala. 295 (51 Sou. 964), uses language especially apt in the decision of this case:

> "All contracts are presumed to intend good faith on the part of the contractors, and the evident purpose of the provision requiring deliveries as fast as water will permit and timber is gotten is that, as soon as the timber can be gotten out, and assembled in such quantities as are usually shipped together, the same shall be delivered. Of course, the party selling the timber must be allowed some discretion, in consulting his own convenience as to the quantities to be shipped at one time; but any manipulation of the deliveries for the purpose of working a fraud on the other party will be rebuked by the court."

When Jackson's representative went to Prudential's representative in September, 1942, with an offer from Darling it was the duty of Prudential to negotiate. Prudential could not, by refusing to negotiate, make it impossible for Jackson to perform his contract. The Supreme Court of Alabama has spoken upon this matter in the case of Gulf Trading Co. v. Radcliff, 216 Ala. 645 (114 So. 308):

"The owner is under the duty of good faith in all dealings with his agent. Hence it is well settled that, if he obstructs or hinders the agent in concluding the negotiations within the time limit by avoiding interviews with the agent or customer by encouraging the buyer to delay his purchase, or any other device, and thereafter, acting directly or through another, he closes the deal with the customer procured by the agent on as good, or even less favorable, terms, commissions are due the agent. Likewise, if, pending negotiations, he fraudulently revokes the agency, or partially revokes the same by reducing the time, depriving the agent of the opportunity to earn commissions, and, taking advantage of the agent's services, he closes with his client, commissions are due."

When a new lease was executed whereby Darling continued in possession of the premises, this new lease conclusively demonstrated that Darling was a satisfactory tenant. The owner cannot go ahead and deal with the prospective tenant, obtained by the broker, and wind up the negotiations with a lease to such tenant, without being liable to pay the broker his commission.

The Supreme Court of Alabama makes remarks that are very pertinent to this case in the case of Garnet v. Gunn, 206 Ala. 471 (91 So. 382), in which it is said:

"The contract between the parties to this cause not having been performed according to its terms, and plaintiff having no exclusive right in the premises, defendant had the right, without reference to plaintiff or his claim, to deal in good faith with his property on any terms that did not involve any appropriation of the benefit of what plaintiff had done in the way of procuring a purchaser.

" * * * And if defendant, without definite and bona fide interruption, continued the negotiation with his vendee, into the way of which he had been put by plaintiff, and thus accepted the benefit of plaintiff's

services, but arrived at a trade radically different from that originally contemplated by the parties, he would be answerable to plaintiff in a quantum meruit."

B.

Where an agent has an exclusive agency to lease, even the owner, by making the lease direct, cannot defeat the agent's right to a commission. The Supreme Court of Alabama has decided this point in the case of Erswell v. Ford, 211 Ala. 242 (100 So. 96). In that case the owner, Erswell, had contracted with Ford, the broker, as follows:

> "From this date until December 31, 1922 I appoint you my agent, and give you the exclusive right to handle all my rentals and sales on a commission basis of 2½ per cent, on my Birmingham property * * *."

On September 10, 1919 Erswell executed what amounted to a contract to convey the property to a purchaser on or before January 23, 1923 subject to be defeated by certain conditions. On September 18, 1919 Ford sued Erswell for a breach of the exclusive contract. The defendant contended that the option had not been exercised; that no deed had been delivered; that the contract had not been executed. Rejecting this contention and sustaining the suit, the court said:

> "It is to be noted that this contract to convey (subject to be defeated by conditions) was made to expire only a few days after the contract Mrs. Erswell had theretofore made with Ford. Looking to the substance rather than the form, as should have been done in the decree, the trial court held that the bill was not prematurely filed on September 18, 1919. And such was the fact. When the contract of September 10, 1919, was entered into the breach of contract existed."

Thus Jackson's cause of action ripened when the Ann Lewis lease was made irrespective of whether it was ever performed by the parties.

II.

The opinion of the Circuit Court of Appeals does not mention a single decision of the Supreme Court of Alabama. Strange to say, the opinion does not cite a single case from any jurisdiction, even its own.

Since the decision of this court in Erie Railroad Co. v. Tompkins, 304 U. S. 64, the local law has been of vital importance in the Federal Courts. Those Courts cannot make local law. They merely apply the local law as given them in the opinions of the Supreme Court of the particular state.

Whenever a Federal Court decides a question of purely local law in utter disregard of that law, is not that Court depriving the litigant of due process under the 5th Amendment? We respectfully submit that the Court in this case should grant the writ of certiorari, apply the local law and reverse and render the cause.

Has the Court of Appeals, in the instant case, given a decision on the questions involved? Is not this situation covered by the language of this Court in Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257? We refer to the following:

> "Applying this doctrine to the facts and circumstances which we have previously stated, we are of the opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard."

In that case this Court said:

> "• • • the judgment of the Circuit Court of Appeals must be reversed and the case be remanded to that court to the end that the duty to hear and decide it may be performed."

If it is a violation of the Fifth Amendment to condemn a man's property without due process of law by force of a judgment in which the error is gross and obvious, is it not likewise a violation of the due-process clause to take away a man's recovery by a judgment in which the error is gross and obvious?

Is it not clear that the Circuit Court of Appeals by its complete disregard of applicable decisions of the Supreme Court of Alabama has failed to act in accordance with the standards of proper procedure? We refer this court to the opinion in Duke Power Co. v. Greenwood Co., 299 U. S. 259, in which this language is used:

> "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented."

III.

The opinion of the Court of Appeals shows clearly that the Court did not distinguish between the different counts to which the judgment for $3,625.00 was referred. The Court's confusion is distressing in its treatment of counts

6, 7 and 8. They were the common counts and sought recovery on a quantum meruit. The Court imputes nonexistent allegations as to those counts.

The Court treats counts 3 and 9 as if they were one and the same. Count 3 proceeds on the theory the plaintiff had obtained a lease and was thereby entitled to pay, while 9 proceeds on the theory that Prudential breached its exclusive contract with Jackson and negotiated itself a lease with a third party.

IV.

The opinion of the Circuit Court of Appeals is contrary to the Alabama law in its treatment of the sales contract entered into on November 28, 1939 and the management or leasing contract entered into on April 22, 1937 as one. These contracts relate to different things. They are not to be construed together if the Alabama law is followed. In the case of Norville v. Lowenstein, 233 Ala. 249 (171 So. 357) the Supreme Court of Alabama holds:

> "A written contract made at a remote time, in another and separate transaction, cannot be incorporated into a subsequent written contract without some reference to that effect."

Even though the sales agreement entered into more than two years subsequent to the leasing agreement should be considered as one with the leasing agreement, that would not defeat Jackson's right of recovery. Jackson had rendered his service in obtaining a satisfactory tenant prior to January 11, 1943 when the purported redemption was dated.

It is a familiar rule of law that fraud is never presumed. Business men, when entering into a contract, are presumed to be contracting about realities. They are not engaged in shams and subterfuges in the vast majority of cases. Hence

when the sale of property took that property out of Exhibit "A" the sale had in mind was a real sale. A sale carries with it dominion over the thing sold. Prudential retained dominion to the extent of a veto on any lease by the dummy grantee, the selection of a tenant by the dummy grantee and the receipt of the rents to reduce its investment.

V.

The great Judah P. Benjamin in 1859 argued a similar case before this Court. He said:

> "This case is a very simple one. Emmerling, a real estate broker, was employed by Kock to find a purchaser for his plantation at the price of $250,000. A purchaser was found by the broker, with whom the bargain was made by Kock at the price fixed by himself. After making a verbal agreement for the sale, Kock changed his mind, and refused to sell. The question is, whether he can lawfully refuse to pay his broker the commission earned, on the ground that the sale was not actually effected, when it was his own act that prevented the accomplishment of the sale.
>
> "The judge below decided rightly that the commissions were due."

See Kock v. Emmerling, 63 U. S. 69.

Respectfully submitted,

.....

CRAMPTON HARRIS.

APPENDIX

Title 7, Section 727, Code of Alabama 1940:

Redemption by debtor et als.—Where real estate, or any interest therein, is sold under execution, or by virtue of any decree in the circuit court, or under any deed of trust, or power of sale in a mortgage, the same may be redeemed by the debtor, junior mortgagee, vendee of the debtor, or assignee of the equity or statutory right of redemption, wife, widow, child, heir at law, devisee, or any vendee or assignee of the right of redemption under this Code, from the purchaser, or his vendee, within two years thereafter in the manner provided in this chapter.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 135

JACKSON SECURITIES & INVESTMENT COMPANY, A CORPORATION,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION,

Respondent

RESPONDENT'S ANSWERING BRIEF

This brief is submitted by The Prudential Insurance Company of America (hereinafter called Prudential), the defendant in the trial court, in answer to the contentions advanced by Jackson Securities & Investment Company (hereinafter called Jackson), the plaintiff in the trial court, in the latter's Petition for a Writ of Certiorari and in its accompanying Brief and Argument.

The decision of this case by the Honorable the Circuit Court of Appeals of the Fifth Circuit is officially reported in 159 F. (2d) 678 as "The Prudential Insurance Company of America, a corporation, Appellant, *v.* Jackson Securities & Investment Company, a corporation, Appellee."

Question Presented

The Respondent submits that the questions set forth on p. 3 of the Petition do not fairly or accurately indicate the issues of this case.

The question which the Circuit Court of Appeals decided, as the language of its opinion makes clear, was the question posed by Prudential in its brief to that Honorable Court in the following language:

> "Where there were two contracts in force between two parties, one constituting the plaintiff the defendant's sales broker to sell properties acquired by the defendant through the foreclosure of mortgage loans and the other constituting the plaintiff the defendant's managing and leasing agent with the duty, among others, to keep the properties tenanted pending their sale, both of which contracts provided remuneration to the plaintiff on a commission basis, and where the Sales Contract reserved the right of the defendant owner to deal directly with a former mortgagor who desired to redeem or buy back a property which he had lost under foreclosure, and expressly provided that, in the event of such sale or redemption, no sales commission would be paid the plaintiff, does the defendant's making such a sale of a property back to its former owner (and thereby precluding the plaintiff's earning further management or leasing fees in connection therewith) give rise to a cause of action in the plaintiff for breach of the Management Contract?
>
> "Stated more tersely, the proposition is simply whether, under the contracts here in litigation, the Owner was under a duty to the Agent to indefinitely retain ownership of its property in order that the Agent might make a brokerage fee by leasing the same."

Statement of Facts

The Respondent is not satisfied with the accuracy, clarity, relevancy or completeness of the Petitioner's Statement as set forth at pp. 5-13 of the Petition, and therefore submits its own Statement of Facts.

The essential facts which control this controversy are simple. Stripped of irrelevancies, those facts are the following:

Prudential had a standing contract with Jackson, the Sales Agreement (Ex. P4),[1] wherein it constituted Jackson its agent to sell all properties which it, Prudential, might acquire in the area of Birmingham, Alabama, as a result of mortgage foreclosures. In addition, Prudential had a standing Management Agreement (Ex. P3) with Jackson which provided that Jackson should rehabilitate, manage, and assist in leasing such foreclosed properties pending their sale. Under the law of Prudential's domicile, it was incumbent upon it to sell such properties within a limited period (Rec. p. 79, ques. 26; p. 449 bottom).

Prudential in 1935 made a mortgage loan to a party named Nelson on property located in Birmingham. Later Prudential foreclosed and, on January 10, 1941, became the owner subject to Nelson's two year statutory right of redemption. Jackson, the standing managing agent, secured a tenant for the property, one Darling, for the period antecedent to the date when Nelson's redemption rights would expire (Ex. P6). Jackson has been paid its commission in connection with this short term lease (Rec. pp. 234-5).

Toward the expiration of the two year period (*i. e.*, in the fall of 1942), Prudential considered two possibilities—

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[1] Respondent is unable to cite any page in the Record where any of the exhibits may be found because the Petitioner has failed to have these printed. No request was made that counsel for Respondent agree to the omission of the printing of said exhibits.

either selling the property after Nelson's rights should have expired, or making a "long term" lease (Ex. C). Jackson sought to promote a further leasing to Darling (Rec. pp. 276, 311). Prudential never gave Jackson the terms upon which it would be willing to make a new lease (Rec. pp. 285-7). The Management Agreement contained this clause in par. 12 (Ex. P3):

> "The Manager shall have the right to rent said properties or any parts thereof, if vacant or about to become vacant, in such manner and upon such terms and conditions as shall previously have been approved by an officer or authorized representative of the Prudential; *provided, however, that every lease or renting for more than one year must be approved by the Home Office of the Prudential or by the Finance Committee of the Board of Directors of the Prudential before it shall become binding upon the Prudential.*" (Emphasis supplied.)

Darling, desiring to remain in the property, made Prudential two lease offers, both calling for leasings of more than one year's duration. The earlier of these offers was submitted to the Prudential's Birmingham Branch Office through Jackson, and was specifically rejected (Rec. p. 284). The later offer was submitted by Darling direct to the Prudential's Home Office, and was unanswered (Ex. P 17). The Prudential was dissatisfied with Darling as a tenant because of the dilatory manner in which Darling had paid the "overage rent" during its short term lease (Rec. pp. 309-10).

Darling thereupon sued Prudential both in Alabama and New York on the strength of a clause in its short term lease giving it a "first opportunity to negotiate for a renewal . . . on basis satisfactory to the Landlord." The bill filed by Darling in Alabama was dismissed on the merits (Ex. I). In the New York suit, Darling obtained *ex parte* a temporary restraint against Prudential's leasing to any

other party, but, after argument, Darling's motion for a preliminary injunction was denied and the restraining order dismissed (Ex. P. 24; Rec. pp. 98-9).

Prudential at this point (after some inconclusive negotiations with Ann Lewis, a competitor of Darling, which also desired to lease the site—as to which proceedings see Ex. P 35) decided to sell the property back to Nelson, the former owner, which was seeking to "redeem" (Rec. pp. 81-2, ans. to ques. 42; Ex. N; Ex. P 41; Ex. P 47). Nelson was able to finance the repurchase only through Prudential's extending to it a purchase money mortgage of $310,000. Nelson also borrowed of Darling the $30,000 cash which Prudential insisted on having (Ex. P 42, P 47). This borrowing was a separate matter involving only Nelson and Darling (Rec. pp. 479, 511, 534). Nelson promised to lease the property to Darling on certain terms in consideration of the loan advanced by Darling (Ex. P 55). Jackson, the plaintiff, had nothing whatever to do, as broker or otherwise, with either the Prudential's sale of the property to Nelson or Nelson's lease of the property to Darling.

Prudential sold to Nelson without the employment of Jackson, pursuant to a paragraph of the Sales Agreement reading in part as follows (Ex. P 4, par. 16):

> "16. . . . The Prudential expressly reserves the right at its option to deal with any person who had an interest in the property prior to foreclosure or other acquisition of title by the Prudential, and in the event of such dealing, the Broker will not be entitled to any commission for the sale of the property to any person so interested, unless specifically agreed upon by the Prudential in writing. The Broker fully understands that it is the intention and the settled policy of the Prudential to allow a person formerly interested in any particular property to re-acquire title thereto from the Prudential if satisfactory terms can be made, and for such reasons the Prudential has reserved the right

to deal directly with any person formerly interested in the property."

The entire transaction was summarized on the minutes of Prudential's Finance Committee as follows (Ex. P 47):

"We are asked to permit redemption by The Frank Nelson Estate, Inc., our former mortgagor under loan #346265, at $352,000., to be paid $42,000. in cash and $310,000. by a purchase-money mortgage. We will give a quit-claim deed.

"The redemption price represents the amount due this Company on the original mortgage at the date of foreclosure sale, January 10, 1941, plus reimbursement for some improvements and for the advance of taxes, with interest at 5 per cent, after crediting the redemptioner with approximately $24,000. net rents realized by the Company over the period of its ownership and administration of the property. Under the terms of the proposed redemption, we will not credit all of rents received to date, but will retain $8,500. in order to save the Company harmless from extraordinary expenses in connection with the property, including costs of litigation with our tenant, Darling Stores and its Birmingham subsidiary.

"Under the law of Alabama, the Company could insist that redemption be made with 10 per cent interest, or at a figure of approximately $409,000. The Company is also entitled by law to retain all the rents received by it during the period of its ownership, there being no obligation upon it to account to the redemptioner. The above-mentioned concessions to our former mortgagor are proposed for the purpose of doing equity. We avoid taking the unconscionable interest rate permitted by the Alabama statute.

"Of the $42,000. to be paid in cash on consumation of the redemption, $30,000. will be funds of the redemptor, and $12,000. will be paid us by Darling, our tenant, as the balance of overage rent due under its lease which expired December 31, 1942. This sum, when received, will be credited to the Nelson Estate, in a similar manner to the crediting of the $24,000. of rents already received from Darling.

"This redemption will terminate our dispute with Darling as to its alleged right to a renewal of its lease (Darling having arranged to become tenant of the Nelson Estate), and will avoid any grounds of complaint by a competitor of Darling to whom we were about to lease the property, when Darling started suit to enjoin us from that action. Darling will discontinue its suits pending in New York and Alabama, and will pay us rent for its occupancy during the interim between December 31, 1942, and January 10, 1943, the redemption date.

"The terms of the $310,000. mortgage will be as follows:

"Mortgage principal—$310,000.

"Interest rate—4½%.

"Amortization—1% of original principal amount each first 2 years.
1½% 3rd year.
2% 4th year.
2½% 5th year.
3% 6th year and each succeeding year.

"Term—10 years.

"Appraised value (1943) Land and Building $450,000.

"Prepayment privilege #102 for first five years; open prepayments thereafter.

"Prepayment privilege #102 permits payment of not to exceed 20% of original amount of loan in any one year during the first five years, such privilege not to be cumulative.

"Special Provisions:

"Redemptioner to pay all taxes due and payable on or after date of redemption.

"Lease to be satisfactory to P. I. C.; to be subordinated to our mortgage and to be assigned to P. I. C. as collateral security."

* * * * * * *

[Stamped:] "Approved by Finance Committee.
"G.
"Secretary."

ARGUMENT

I

Petitioner's theory of its case depends entirely on an unproven fact—viz., that Prudential's sale to Nelson was fictitious transaction. The uncontroverted evidence in the case establishes the contrary.

A basic proposition, which is entirely unsupported in fact, underlies the Petitioner's case. That basic proposition is that the sale by Prudential to Nelson was a sham. Certainly if the sale was real, as Respondent insists it was, Jackson can have no case at all. If the sale was real, the leasing to Darling was Nelson's act; and if anyone was liable to Jackson for its alleged producing of Darling as tenant, it would have to be Nelson. (But as has been stated, Nelson did not employ any broker to find it a tenant.) Prudential could be liable to pay Jackson a leasing fee only if Jackson had produced Darling to be the Prudential's tenant. And, when the facts are that Prudential did not lease the property to Darling, but sold it to someone else who made a lease, it is elementary that Prudential can have no obligation to pay brokerage in connection with the lease made by its successor in title.[2]

Jackson, in complete disregard of the facts, presents its case as if Nelson was Prudential's dummy and as if the sale to Nelson was a nullity. This is tantamount to charging that the entire transaction was tainted by fraud. So serious a charge should demand some proof, but the only

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[2] This present case is to be distinguished from one in which the property is sold subject to a lease which contains a renewal option negotiated by the broker between the tenant and the former owner. In that situation some rights in favor of the broker might hang over. But when the Prudential sold the property, Darling's lease had wholly expired. No options or renewal rights remained outstanding. On that point the decree of the Circuit Court of Jefferson County in the injunction suit which Darling brought against Prudential is *res judicata*. (Ex. I.)

evidence submitted by Jackson is certain papers garnered from the Prudential files which merely indicate that Prudential hoped that Nelson would finance its repurchase through Darling. Far from indicating that the sale to Nelson was to be a fictitious cloak, these letters, when read in their entirety, serve only to show the legitimate interest of Prudential in the outcome.

Prudential produced clear and convincing proof of the authenticity of the sale to Nelson. Mr. R. R. Rogers, its Vice President in charge of the transaction, testified (Rec. pp. 81-82, answer to ques. 42) as did also Mr. Frank Nelson, President of Nelson. (Rec. pp. 492-495). The evidence of both denies the possible existence of any secret understanding behind the record documents which are in evidence (Ex. P 52 and Ex P 56). Prudential has no interest in the property today except as the holder of a mortgage (Rec. pp. 492-3).

It is of no legal significance whatever that Darling has arranged to pay a part of the rent accruing under its lease from Nelson, to Prudential in order to make sure that the paramount mortgage is kept in good standing, with Prudential remitting the excess to Nelson after deducting the amounts due on the purchase money mortgage (Rec. pp. 494-5; Ex. P 41). Jackson pretends to believe that these facts establish a tenancy relationship between Prudential and Darling, but the instruments in evidence show this contention to be preposterous (Ex. P. 10, P 53, P 55, P 41, P 42).

For the purpose of simplification, Prudential passes over the question whether the sale to Nelson qualified as a "strict legal redemption" under the Alabama statute. The case does not require the decision of that point. The essential issue is the passage of title out of the Prudential before the leasing to Darling on which Jackson predicates its claim. Once it is established that the sale to Nelson inter-

vened between Prudential's ownership and the lease to Darling, Prudential is dissociated from the very basis of Jackson's claim.

II

Petitioner's alleged case ignores a fundamental rule of brokerage law which absolutely precludes the existence of a cause of action on the facts of this case.

The whole case of the Petitioner rests upon a fundamental misconception of the pertinent rule of brokerage law—a rule as to which there is no difference of opinion between the federal courts and the courts of Alabama. Reference is made to the rule that when a broker is engaged by an owner to bring in offers, the broker has not earned a fee until he brings in an offer which the owner finds acceptable and which the owner accepts. Unless this happens the broker has not produced a deal and is entitled to no compensation for his efforts. If, on the other hand, the owner gives the broker his terms for leasing and the latter produces a prospect ready, willing and able to conclude such a lease, the fee has been earned whether or not the owner goes through with the deal.

This general rule is ably stated in the case of *Handley* v. *Shafffer* (Sup. Ct. of Ala., 1912), 177 Ala. 636, 59 So. 286, as follows:

> "'If the employment is merely to procure a purchaser, without specification as to the price he is to pay, it is evident that no compensation can be recovered by the broker unless the purchaser is accepted by his principal on the principal's own terms. But if the broker is to procure a purchaser on specified terms, and does procure one who is able, ready, and willing to buy on those terms, he is entitled to the compensation agreed on, although, by reason of his principal's fault or refusal, the sale is in fact never made. 19 Cyc. 242, 246.'"

To the same effect as the first quoted sentence see *Manning* v. *Springfield Institution for Savings* (Sup. Jud. Ct. of Mass., 1945), 317 Mass. 480, 58 N. E. (2d) 817, and *Cadigan* v. *Crabtree* (Sup. Jud. Ct. of Mass., 1901), 179 Mass. 474, 61 N. E. 37. Many other cases could be cited from various states.

Further Alabama Supreme Court authority on the same point is found in *Erswell* v. *Ford* (1921), 205 Ala. 494, 88 So. 429; *Bruce* v. *Drake* (1915), 195 Ala. 236, 70 So. 273; *Smith* v. *Sharp* (1909), 162 Ala. 433, 50 So. 381.

Petitioner persists in the intellectual error of ignoring the fact that it never accomplished what was necessary, under the rule just stated, in order for it to earn a fee. It was not enough that Jackson submit leasing offers to Prudential from Darling. It was essential to a recovery by Jackson that Prudential find one of these offers acceptable and accept it. Prudential, not having outlined its terms and being in the market for the best available offer, was free to decline all Darling's offers, if it chose to do so. Nothing in the contractual relationship of the parties gave Jackson the right to insist that Prudential take Darling and thus to foist upon Prudential a tenant which Prudential regarded as undesirable.

Petitioner pretends to believe that Prudential "accepted" Darling when Prudential reviewed the lease from Nelson to Darling (which was pledged by Nelson as collateral security in support of the purchase money mortgage) and then pronounced that lease satisfactory from the standpoint of its being found to call for rentals sufficient to put Nelson in funds to carry the Prudential mortgage. Obviously this was not a landlord's acceptance of a new tenant, which is the "acceptance" the courts are talking about when they lay down the rule of brokerage law relevant to such a case as this.

It is completely dispositive of Jackson's alleged case that Prudential, never having announced its terms, did not ever reach a meeting of the minds with Jackson's prospect, Darling.

What happened in this case was that Prudential sold the property before Jackson ever earned any brokerage. Jackson has no right to complain of the sale because Prudential never undertook that it would not sell whenever it pleased. 2 *Mechem's Law of Agency,* 2nd Ed., p. 2037, Sec. 2445; *Ingold* v. *Symonds* (Sup. Ct. of Ia., 1904), 125 Ia. 82, 99 N. W. 713. See statements to the same effect by the Alabama Supreme Court in *Morris* v. *Clark* (1918), 202 Ala. 324, 80 So. 406 and *Crook* v. *Forst* (1897), 116 Ala. 395, 22 So. 540.

Furthermore, it is unduly speculative for Jackson to claim to have been even indirectly damaged by the occurrence, *i. e.*, the sale, because it can have suffered no loss thereby unless one assumes that, had the Prudential continued to hold the property, Jackson eventually would have submitted an offer from this particular prospect, Darling, which the Prudential Home Office or its Finance Committee would have found acceptable. See *Millican* v. *Haynes* (Sup. Ct. of Ala., 1925), 212 Ala. 537, 103 So. 564; also *Manning* v. *Springfield Institution for Savings, supra,* p. 11.

Such conjectures cannot be reconciled with the reality that Jackson desisted from its efforts in mid November, 1942, or more than six weeks before the sale was arranged (Rec. pp. 305, 310).

III

Petitioner, having no cause of action, is entitled to no greater standing in Court by reason of its claim of an exclusive agency to lease.

Petitioner apparently lays great stress upon its allegation that it was the *exclusive* agent of Prudential. The fact itself is in dispute. Respondent concedes that management functions under the Management Agreement (Ex. P 3) were vested exclusively in Jackson, but in interpreting the contract distinguishes between these functions, on the one hand, and the leasing of the various properties under Jackson's management, on the other hand. Respondent asserts that it is clear from the language of the contract that Prudential could call on other brokers to lease a specific property if it chose to do so, and also that Prudential was not precluded from itself competing with its agent.

However, these discussions, injected into the case by Jackson, were rightly regarded as irrelevant by the Circuit Court of Appeals. They are not relevant because the Prudential did not *lease* the property either itself in competition with Jackson or through another broker, but itself *sold* the property—a matter specifically covered by paragraph 16 of the Sales Agreement (Ex. P 4) quoted *supra* on p. 5.

Petitioner pays considerable attention to the chafferings, prior to the sale to Nelson, between Prudential and Ann Lewis for a leasing. It is not clear why this matter is injected into the case, but the salient fact is that no agreement to lease was ever reached between these parties. The Prudential Finance Committee did authorize a leasing to Ann Lewis but it can be established (a) that the authorization was conditional (Ex. P 26), (b) that news of the authorization was never communicated to Ann Lewis (Ex.

P 27, P 35) and (c) that the terms authorized were materially different from terms submitted by Ann Lewis (Cf. Ex. P 12, particularly par. 15, and Ex. P 26).

If the claim of an exclusive agency to lease is advanced by the Petitioner with a view to strengthening its statement that it is the duty of a principal to deal with his *exclusive* agent in good faith, the emphasized word is surplusage. The law requires that an owner treat with any agent employed by him in good faith. Bad faith in brokerage cases, however, is not undefined, but is described at length in many cases, in Alabama and elsewhere, with full and specific details as to how certain parties went about pickpocketing their brokers out of earned or virtually earned commissions.

The Petitioner has apparently not studied the rule of law of the bad faith cases, as it shows total unfamiliarity with that rule. The basic proposition is stated as follows in *Elliott* v. *Kazajian* (Sup. Jud. Ct. of Mass., 1926), 255 Mass. 459, 152 N. E. 351:

> "The right to revoke [an agent's authority] is not dependent upon the reasons which may lead to its exercise, provided that it is exercised in good faith, which here means for any reason other than to obtain the results of the broker's efforts without paying for them."
>
> • • • • • • •
>
> "The cases in which such bad faith has been found to exist are cases in which a sale has later been made. Profit from the plaintiff's exertions seems essential to proof of bad faith."

And see to the same effect 2 Restatement of the Law of Agency, pp. 1069-70, Sec. 454; 4 R. C. L., Brokers, p. 317, Sec. 54; 8 Amer. Juris., Brokers, p. 1008, Sec. 41.

It follows that in the instant case an essential element is lacking in that no deal between Prudential and Darling ever

occurred. Prudential did not "run around" its broker, Jackson, to make a lease with Jackson's prospect, Darling, but instead sold the property *bona fide* to a third party.

Even if it could be shown that Nelson was merely a dummy for Prudential in taking title, thus lending some credence to Petitioner's allegation that Nelson's lease to Darling is in reality Prudential's, it would not follow that Prudential was liable to Jackson under the rule of the bad faith cases. It would be an essential condition to its recovery that Jackson show that the real reason for Prudential's action in using a dummy was to avoid paying Jackson an *earned or virtually earned* fee,[3] and not because Prudential wanted to dispose of the Darling litigation or to rid itself of the property in compliance with the law of its domiciliary state. In the voluminous record there is no evidence even remotely touching upon Prudential's intentions toward Jackson in the matter of any Darling fees.

Lacking the specific elements of a bad faith case, the Petitioner, throughout the course of this litigation, has attempted to supply the deficiency by loose charges of fraud (which is not alleged in its pleadings) and overbearing conduct on the part of Prudential in connection with collateral matters, such as Prudential's alleged relations with other parties, viz., Darling and Ann Lewis. It it not shown by the Petitioner, and cannot be shown, that the alleged actions involving Prudential and those third parties, touched Jackson's interests in any way since Jackson had quit all its efforts with respect to the property many weeks before the sale to Nelson was negotiated. Jackson's efforts had already ended in complete failure (Rec. pp. 305, 310).

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[3] It has already been demonstrated under Point II, *supra*, that because the ready, willing and able rule does not apply to this case, Jackson cannot establish this prerequisite fact. Jackson could not earn a fee, or virtually earn one, without a favorable action by Prudential's Home Office or Finance Committee.

IV

This case presents no conflict between the law applied by the Circuit Court of Appeals and the decisions of the Supreme Court of Alabama.

In the first point made in its Brief, at pp. 15-16, Petitioner adverts to a general rule of contract law which it claims has been ignored by the Circuit Court of Appeals. Wholly misconceiving the nature and scope of bad faith as defined in the brokerage cases, Petitioner complains, in the last paragraph at the bottom of p. 16, of Prudential's alleged refusal to negotiate with Darling. The law is clear enough that such a clause as that in the short term lease from Prudential to Darling under which Darling claimed a "first right to negotiate" and asserted that a corresponding duty to negotiate rested on Prudential, is uniformly held void for uncertainty in all jurisdictions. See *Annotations* at 68 ALR 157 and 30 ALR 572. But if it should be supposed that Prudential owed Darling a duty to negotiate, how does Jackson, a mere agent and the Prudential's agent rather than Darling's, come to be a third party beneficiary of that contract to the extent that it can claim damages of Prudential because of Prudential's alleged refusal to negotiate with Darling?

In *Hughes* v. *Daniel* (Sup. Ct. of Ala. 1914), 187 Ala. 41, 65 So. 518, the broker was accorded no such prerogative, the court saying:

> ". . . Plaintiff was not a party. He was a mere middleman, a broker. He was to receive a benefit, but his right depended upon the execution of an agreement between the negotiating principals. As for any right of plaintiff, the principals negotiating for a contract were free to insist upon their own terms."

The legal authority which Petitioner submits on the general point of contract law at pp. 15-16 of its Brief is not relevant because when one turns to the contract which defines Jackson's agency in the matter of Prudential leasings, the Management Agreement (Ex. P 3), one finds that Jackson is employed merely to submit offers. That is all that is required of Jackson in the matter of leasings of over one year's duration. Therefore, it is specious for Petitioner now to contend that it was prevented from performing its contract, *i. e.* from submitting offers to Prudential, by Prudential's refusal to make Darling any counter-offer.

The supposed conflict between the law applied by the Circuit Court of Appeals and the law announced by the Supreme Court of Alabama does not exist. Respondent agrees with the law cited in Petitioner's Brief under its Point I A, and also with the Alabama law cited elsewhere in the Petitioner's Brief, but simply points out that all these propositions are irrelevant to the issue of the instant case.

Moreover, in its Point I B, Petitioner again falls into error as to elementary law. In citing *Erswell* v. *Ford* (Sup. Ct. of Ala., 1924) 211 Ala. 242, 100 So. 96, as an applicable precedent, Petitioner fails to note the distinction between an *exclusive agency* to lease, on the one hand, and an *exclusive right* to lease, on the other hand. For a statement of the correct rule of law see 8 *Amer. Juris.*, Brokers, pp. 1014-5, sec. 57. This distinction demonstrates the invalidity of the assertion made by Petitioner at the commencement of its sub-point B on p. 18. The Petitioner's short statement of the matter involved, on p. 2 of the Petition, is predicated on this same error.

If *Erswell* v. *Ford* is cited by the Petitioner for the purpose of establishing a right of action in itself for anticipatory breach in connection with Prudential's alleged leasing

to Ann Lewis, as appears by the concluding sentence of this sub-point B on p. 19, a complete legal defense is afforded Prudential by the factor of good faith. See *Williston on Contracts* (Rev. Ed., 1937) Vol. 5, p. 3727, sec. 1325, citing *Mobley* v. *New York Life Insurance Co.* (1935) 295 U. S. 632. There is no proof in this case that Prudential, when it chaffered with Ann Lewis, did not in good faith construe the Management Agreement (Ex. P 3) as constituting Jackson a *non-exclusive* agent to lease.[4] Respondent still, moreover, vigorously insists that a reading of the entire contract will convince any fair mind that Jackson did not have an exclusive agency to do anything more than manage, excluding leasing from the term "manage."

Under its Point IV, the Petitioner contends, at p. 21 of its Brief, that the Circuit Court of Appeals has construed the Management Agreement (Ex. P3) and the sales Agreement (Ex. P 4) as one instrument, and that this is contrary to Alabama law. Respondent does not concede the premise. As Respondent sees it, the Circuit Court of Appeals has construed each instrument separately with due regard to the contractual relationship existing between the parties (see 12 *Amer. Juris.*, Contracts, p. 783, sec. 246) and has correctly applied the Sales Agreement to the transaction in this case, which was a sale by Prudential to the former owner Nelson, and not, as Petitioner so persistently asserts, a leasing to Darling.

The Respondent submits that the Petition for a Writ of Certiorari should be dismissed for the following reasons:

1. The case does not involve a decision by the Circuit Court of Appeals of a point of local law in a way contrary

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[4] Strictly speaking, Jackson was not an agent to lease, since Prudential furnished no terms, but was merely an agent to bring in offers, as already stated.

to, or in conflict with, the decisions on the same point by the court of last resort of the State of Alabama.

2. The case presents no question of public importance, turns upon the interpretation of certain specialized contracts between the parties, and its outcome is of concern only to the parties.

3. The case as presented by the Petitioner involves issues of fact, requiring a review of the evidence.

4. The Petition discloses no departure by the Circuit Court of Appeals from the usual course of judicial procedure.

5. The Petition does not contain a clear, definite and complete disclosure of the controversy between the parties.

6. The record submitted with the Petition does not comply with Rule 38 of this Honorable Court in that the Petitioner has omitted to print Exhibits P 1 through P 59 and also Exhibits A through Q, and this without asking counsel for the Respondent to agree to the omission of any of the said exhibits from the record.

Respectfully submitted,

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